IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Cr.A.No.127 of 2006 along with
Cr.A.No.376 of 2006

Judgment reserved on 19.03.2007

Date of decision 28.03.2007

Cr.A.No.127 of 2007

Baljeet Sharma — Appellant

Versus

State of H.P. — Respondent

Cr.A.No.376 of 2007

Rajinder Sharma — Appellant

Vs.

State of H.P. — Respondent

Coram:

The Hon'ble Mr. Justice V.K.Ahuja, Judge.

Whether approved for reporting?[1] Yes.

(In Cr.Appeal No.127 of 2006

For the appellant : Mr.Jagdish Vats along with Mr.Neeraj Sharma, Advocates.

For the respondent: Mr.Ashutosh Burathoki, Addl. Advocate General.

(In Cr.Appeal No.376 of 2006

For the appellant : Ms. Rita Goswami, Advocate

For the respondent: Mr.Ashutosh Burathoki, Addl. Advocate General.

V.K.Ahuja, J.

Appellants Rajinder Sharma and Baljeet Sharma in the above mentioned case were tried together and were convicted and sentenced under section 20 of the Narcotic Drugs and Psychotropic Substances Act,1985 (hereinafter referred to as the Act) for rigorous imprisonment for a period of four years and to pay fine of rs.10,000/- by of the appellants. In default of payment of fine each one of them were to undergo simple

[1] Whether reporter of local papers are allowed to see the judgment ? Yes.

imprisonment for one year on the allegations that on 11.10.2004 at about 1 a.m. at bus stand Sundernagar both of them were found in conscious and exclusive possession of 400 grams charas each.

The prosecution story which emerges from the evidence led before the learned Presiding Officer, Fast Track Court, Mandi is that on 11.10.2004 at about 1 a.m. PW-8 Ashish Sharma the then S.H.O. Police Station, Sundernagar along with police officials was present for patrolling duty in a government vehicle and when they reached at bus stand Sudnerangar, they saw both the appellants sitting in the waiting room. The appellants became perplexed on seeing the police party and both of them were carrying a bundle each in their hands wrapped in a newspaper. On inquiry they could not give any satisfactory reply and PW-4 Sohan Lal present in his taxi alongwith one Bansi Ram who was also in the awaiting room were associated in the raiding party and search of the bundles in the hands of the accused was conducted. The bundles were containing charas wrapped in a newspaper and on weighment they were found to be 400 grams each. Two samples were taken out of the charas possessed by both the appellants weighing 25 grams and the samples and the remaining charas was sealed separately and were taken in possession as per procedure and a case was registered against both the appellants. The information regarding grounds of arrest was supplied by the police. A special report was also sent to Deputy Superintendent of Police, sudnernagar and on receipt of the report of the expert and on completion of the investigation challan was filed before the learned Sessions Judge who assigned the case to learned trial court. Both the appellants were tried under Section 20 of the Act and on completion of the trial they were held guilty and convicted and sentenced as detailed above.

I have heard Mr.Jagdish vats and Ms.Rita Goswami learned counsel for the appellants and have gone through the record of the case. I

have also heard Mr.Ashutosh Burathoki, learned Additional Advocate General, for the respondent.

The submissions made by learned counsel for the appellants were that there are contradictions in the statements of official witnesses examined by the prosecution. It was submitted that there is an infirmity in the prosecution case that the constable who had taken the sample has not stated that the seal impression was separately handed over to him. It was also submitted that the Malkhana Register was not produced in court therefore the prosecution story cannot be believed that the case property was deposited in safe custody with the MHC. There is also contradiction in regard to the fact as to whether PW-8 SHO Ashish Sharma was with the police party or how he reached the spot. The main plea taken was that the provisions of section 50 of the Act which are mandatory in nature were not complied with and as such the appellants deserve to be acquitted of the charge framed against them.

On appraisal of the record of the trial court, it is clear that PW-8 the then SHO Police Station, Sundernagar was present near bus stand along with four police officials named by him and driver Chura Mani and they were on patrolling duty. They reached Sudnerangar bus stand at about 1 a.m. and found the appellants sitting in the waiting room of the bus stand who had something in their hands. They became perplexed on seeing the police party and on suspicion their whereabouts were enquired into and then their search was conducted and they were carrying a bundle each in their hands wrapped in a newspaper. A person sitting in the waiting room nearby and another person from a taxi were called and associated in the investigation and on search packet lying in the hands of both the appellants were separately taken in possession and on weighment it was found to be charas weighing 400 grams each. Two samples of 25 grams each were taken from both the packets and these were sealed separately

and sample seal was also taken and seal after use was handed over to PW Sohan Lal and these were taken in possession vide recovery memo which was signed by the witnesses. The grounds of arrest were supplied to the police. The I.O. prepared spot map, recovery memo, recorded the statements of witnesses, filled the NCB forms and handed over the case property to MHC Swaran Singh at Police Station who was holding the charge of MHC in the absence of HC Kundal Lal. PW-8 SHO prepared special report and sent it to Dy. Superintendent of Police through constable Parma Nand. The samples were sent to CTL Kandaghat and on receipt of the report of the CTL Ex.PW8/F the final police report was prepared and was forwarded to the court.

PW-3 HC Parma Nand, PW-4 Sohan Lal and an independent witness have materially corroborated the statement of PW-8 SHO Ashish Sharma in regard to the recovery of charas and its taking into possession by the police.

PW-1 ASI Kishori Lal who was Reader to the Deputy Superintendent of Police, Sundernagar received the special report Ex.PW1/A and it was put up before the Deputy Superintendent of Police who made endorsement over it on 11.10.2004. PW 2 Constable Parmar Chand had taken the special report given to him by PW-8 and it was handed over at the residence of Deputy Superintendent of Police in an envelope. PW-2 had taken the sample parcel along with NCB forms and sample seal and deposited the same in CTL Kandaghat in safe condition. He has stated that the case property was not tampered with during the time it remained in his custody.

PW-6 HC Swaran Singh the then MHC has stated that on 11.10.2004 SHO Ashish Sharma deposited two parcels containing residue charas weighing 350 grams each along with four samples of 25 grams charas each which were duly sealed with seal impression ‘K’. NCB forms

were also given to him. He gave the case property to HC Kundan Lal who had kept in safe custody. PW-7 HC Kundan Lal had taken the case property in his possession and the samples were sent to CTL Kandaghat through Ram Lal.

Coming to the contradictions and infirmities pointed out in the statement of prosecution witness PW-3 HHC Parma Nand a Member of the raiding party had not stated in examination-in-chief that when they were on patrolling duty. PW-8 the then SHO Police Station, Sundernagar was also with them. However, in further examination he had clearly stated that SHO deputed somebody to bring weight and scale from Police Station and in cross-examination also he clearly stated that SHO and ASI were occupying the front seat and they were on the rear seat of the vehicle. The mere fact that he either omitted or it was not recorded that SHO PW-8 was also with them when they were on patrolling duty is not sufficient to hold that PW-8 was not there. However, he clearly stated about the presence of SHO at two places and the mere fact there was omission in mentioning the name of the SHO when his statement was recorded is not sufficient to hold that PW-8 SHO was not present at that time since his own statement and cross-examination coupled with the testimony of other PWs clearly establishes the presence of PW-8 SHO at the spot. The contention put forth in this behalf that the presence of the SHO was not established is devoid of any force and I therefore repel the same.

The next contradiction pointed out was that while PW-3 HHC Parma Nand and a member of the raiding party has stated that SHO deputed somebody to bring weight and scale from Police Station, whereas PW-8 had stated that these were lying in the vehicle and as such there was contradiction in the testimony of these two witnesses. The perusal of the statement of PW-3 shows that some official was deputed to go to Police Station to bring the weight and scale but it was ultimately brought

from the vehicle as stated by PW-8 and this contradiction is minor in nature. It may be that the SHO had deputed an official to go to the police station but subsequently the weight and scale were found in the vehicle itself from where these were brought. Moreover, the recovery in question was effected on 11.10.2004 and the statement of witness was recorded in December, 2005 i.e. after about one year and two months and this contradiction is bound to be there in the case of natural witnesses. However, this contradiction is not in regard to recovery, the manner of recovery or the presence of the accused persons or the witnesses at the spot therefore this contradiction has to be ignored.

Coming to the next infirmity pointed out that the MHC has not stated that the seal impression was also sent to the office of expert or not, or the seal impression was separately sent to the expert or not, a reference has to be made to the testimony of witnesses in this regard. PW-8 had stated in his statement that the case property alongwith sample, NCB forms and sample seal were handed over to HC Swaran Singh who was holding the charge of Malkhana in the absence of HC Kundan Lal. He had also stated about the taking of seal impression Ex.PW3/A separately and handing over of the seal to PW-3 Sohan Lal who has corroborated this statement also. The said HC Swaran Singh has been examined as PW-6 who has stated that the case property duly sealed with seal along with NCB forms were deposited with him. These were handed over by him to HC Kundan Lal who has been examined asPW-7 and has stated that the sample seals were also handed over to him ex.PW3/A and Ex.PW3/B alongwith NCB forms. He also stated that sample seals were sent along with NCB forms through Constable Ram Lal who has been examined as PW-5 and has corroborated this statement that the sample seal covered in an envelope were separately given to him.

A perusal of the report of the expert Ex.PW8/A shows that the samples were received by the expert in a safe manner and the sample seal separately sent tallied with the specimen impression of seal taken separately. Thus there was no tampering with the seal and the seal impressions were separately taken and sent to the expert also. The mere fact that Malakhana Register was not produced during the trial of the case is not sufficient to hold that the statement of these official witnesses cannot be believed and their evidence is of formal nature and even duly attested affidavits could have been filed in evidence. However, in case there was any doubt that the case property was not properly received or entered in the Malkhana, the statement of witness could have been deferred and the witness could have been asked to produce Malkhana register during the trial of the case. However, this was not done and the mere fact that the entries of Malkhana Rgister were not produced by summoning the original register is not sufficient to hold that the statement of official witnesses made in this regard on oath and not shattered in cross-examination cannot be relied upon.

The main plea taken by learned counsel for the appellants was in regard to non compliance of provisions of Section 50 of the Act. It was submitted that these provisions apply in case the personal search is to be conducted of an accused though they do not apply in the case of search of bag , vehicle etc. Since the recoveries were effected from the personal search of the appellants from their hands and even though they were not kept concealed, it is not sufficient to hold that the provisions of Section 50 of the Act are not required to be complied with. In support of this plea the learned counsel for the appellants have relied upon decision in **State of H.P. vs. Gurdeep Lal and Anr**., Latest HLJ 2002(HP)-(DB) 1018, wherein it was held that if a person suspected to be possessing charas has to be informed of right to be searched before a Magistrate or a Gazetted

Officer. A reference was also made to the decision of this Court in Gabriel vs. The state of H.P. and other decisions. A perusal of the impugned judgment shows that this plea was also raised before the learned trial court and the learned trial court had referred to the decision of the Hon'ble Apex Court in State of H.P. vs. Pawan Kumar, 2005 CRI.L.J.2208 and it was observed that these provisions of Section 50 of the Act apply only when the personal search of the accused is conducted and would not apply to the search of some baggage, brief case or container etc. which he may be carrying. This decision was rightly referred to by learned trial court and has also relied upon the same, but to my mind the law laid down in that case by Hon'ble Apex Court was wrongly applied to the present facts by learned trial court. The learned trial court had also referred to some other decisions under Section 50 of the act though what was laid down was not clearly specified. However, since the recovery of charas was effected from the hands of the accused and not from any baggage which they were carrying separately, the learned trial court observed that the provisions of Section 50 of the Act would not be attracted to such a search.

A perusal of the decision in Pawan Kumar case (supra) does not show that it has been laid down by their Lordships that the personal search would be presumed only in case the charas or the incriminating article is kept concealed in the clothes or wrapped on the body. This decision does not lay down that in case the incriminating article was kept by the accused in their hands wrapped in newspaper these provisions will not apply. The decision of the Hon'ble Apex Court is very clear that the provisions of Section 50 of the Act would not apply to search of baggage article or container carried by persons. The charas was recovered from personal search of the accused kept in his hand wrapped in a newspaper and therefore the provisions of section 50 of the Act will apply to such a

search. The search was personal and not of any baggage carried by the appellants and therefore the non compliance of Section 50 of the Act leads to an inference that the prosecution case cannot be relied upon and the appellants are entitled to be acquitted of charge framed against them.

Applying the dictum of law laid down in the above case, I accordingly hold that the mandatory provisions of Section 50 of the act were not complied with and as such the appellants are liable to be acquitted of the charge framed against them. The findings of the learned trail curt holding them guilty and convicting and sentencing them are liable to be reversed and as such they are set aside and both the appellants are acquitted of the charge framed against them. The case property shall be disposed of as observed by the learned trial court. A certified copy of this judgment be placed on the record of other case. Release order be issued accordingly since the appellants are in custody.

March 28 ,2007(g) **(V.K.Ahuja), J.**